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IN THE

Supreme Court of the United States

No. 944

October Term, 1942.

MERLIN F. RAINES,
Petitioner-Plaintiff,
vs.
UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY,
Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY COURT OF ERRORS AND APPEALS, AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY COURT OF ERRORS AND APPEALS, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Merlin F. Raines, prays that a writ of certiorari issue to review the judgment of the New Jersey

Court of Errors and Appeals, entered in the above-entitled cause on January 22, 1943 (S. of C.* p. 54), affirming the judgment of the New Jersey Supreme Court in the same cause (S. of C., p. 50).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The Unemployment Compensation Law of New Jersey provides by Section 19h that an employer shall be subject to the tax authorized by the act if he has as many as eight employees in as many as twenty weeks in any calendar year (N. J. R. S. 43: sub-title 21; P. L. 1936, p. 1045). Section 19g broadens this base of eight employees by providing in effect that whenever a contractor uses the services of subcontractors he "shall be deemed to employ each individual in the employ of * * * each subcontractor," that the employees of these subcontractors shall be added to those of the contractor and the latter shall be liable to the tax if the total is eight or over (except that the subcontractor who employs as many as eight employees will himself be liable for the tax on these).

The petitioner had been a builder of dwelling houses since 1938 (S. of C., p. 28). At no time did he employ as many as eight individuals for the maximum period of time required by the statute for attaining taxable status (S. of C., p. 37). But he did regularly engage the services of subcontractors, some of whom had one or more individuals in their employ (S. of C., p. 28).

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* The parenthetical references made herein are to the pages of the record, or "State of the Case" in the court below, copies of which are being furnished with this petition and brief, in accordance with Rule 38-7.

On January 31, 1941, an auditor of the respondent reported that the petitioner had attained employer status, i. e., was liable for the tax, this result being reached "by considering the employees of the subcontractors as employees of Merlin F. Raines, under the provisions of Section 19g" (S. of C., p. 33). On June 30, 1941, "arbitrary assessments" were imposed on petitioner in the total sum of $796.84 (S. of C., pp. 10, 16-26). It appears on the face of those assessments that they were based not only on wages paid by the petitioner to his employees, but also on wages paid by his subcontractors to their employees (S. of C., p. 37).

The subcontractors whose services were engaged by the petitioner were independent contractors as defined by Section 21-8c of the Law, over whose work the petitioner had no control or direction (S. of C., pp. 28, 30). Although the petitioner was without direct means to determine who were the employees of the subcontractors or the amount of the wages paid to them (S. of C., p. 33), the aforesaid assessments included penalties for petitioner's failure to report these employees and their wages.

JURISDICTION.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. A., Sec. 344 (Judicial Code, Sec. 237 as amended).

Petitioner, in initiating his certiorari proceedings in the New Jersey Supreme Court, specified as reasons for setting aside the assessments levied upon him by the Unemployment Compensation Commission that such assessments were "in violation of the rights given plaintiff by the 14th Amendment to the Federal Constitution in that

(a) Plaintiff would thereby be deprived of his property without due process of law, and (b) Plaintiff would be denied the equal protection of the laws" (S. of C., p. 41).

These claims were rejected by the New Jersey Supreme Court, which dismissed the writ. They were reasserted on appeal to the New Jersey Court of Errors and Appeals, the highest court of that State in which a decision could be had. That court affirmed the lower court.

There was thus drawn in question in this litigation in the state courts the validity of a statute of New Jersey, attacked on the ground of its being repugnant in part to the 14th Amendment to the Constitution of the United States and violative of rights, privileges and immunities given by that Amendment and especially set up and claimed by the petitioner.

THE QUESTION PRESENTED.

The question for determination here is whether the "due process" and "equal protection" clauses of the Federal Constitution are not violated by that provision of Section 19g of the Unemployment Compensation Law of New Jersey (N. J. R. S. 43:21-19g) which imposes upon a contractor the irrebutable presumption that he is the employer of his subcontractors' employees, and which requires the Commission to add those employees to the contractor's own employees to determine whether the taxable base of eight employees laid down by the Law is present, and to assess the contractor accordingly.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I. The decision of the New Jersey Court of Errors and Appeals holding that the questioned statutory provision in New Jersey Revised Statutes 43:21-19g, taxing contractors on the basis of their subcontractors' employees, was not in violation of the "due process" and "equal protection" clauses of the Federal Constitution, is probably not in accord with applicable decisions of this Court (as shown in the accompanying brief of petitioner).

The state court should have held such provision to be unreasonable, discriminatory and invalid under the 14th Amendment to the Federal Constitution because—

(a) It imposed a fictitious premise as the basis for taxation and bound the taxpayer by the fiction.

(b) It introduced a subclassification that contravened the Act's basic principle of classification.

(c) It required the petitioner to pay an excise tax on another man's privilege.

(d) Its effect was necessarily to discriminate unfairly against petitioner and his class.

II. The state court further erred in upholding the imposition of penalties upon the petitioner for failure to report the wages of his subcontractors' employees, when he had no means of ascertaining these. Such imposition was a taking of petitioner's property without due process of law.

III. Statutory provisions substantially similar to those of Section 19g of the New Jersey Unemployment Compensation Law are found in 20 other states*, and affect a great number of contractors, subcontractors and their employees. The question of the liability of contractors to pay a tax measured in part by the employees of their subcontractors is one of wide public concern and should be set at rest by decision of this Court.

For these reasons it is respectfully submitted that this petition should be granted.

LOUIS B. LEDUC,
Attorney of Petitioner.

Camden, New Jersey,
April 2, 1943.

BRIEF IN SUPPORT OF THE PETITION.

OPINIONS OF THE COURTS BELOW.

The opinion of the New Jersey Supreme Court was rendered by Chief Justice Brogan. It appears in the record submitted herewith (S. of C., pp. 42-50), and is published in 129 N. J. L. 28; 28 A. (2d) 46.

The New Jersey Court of Errors in affirming adopted as its own the opinion of the Chief Justice (S. of C., p. 53).

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* This total is drawn from the Prentice-Hall service on this legislation.

THE STATUTE INVOLVED.

This cause involves the New Jersey Unemployment Compensation Law, which may be found in New Jersey Revised Statutes 43:21-1 to 43:21-24. The pertinent sections of the statute are R. S. 43:21-19, sub-paragraphs (g) and (h), which, together with 21-19 (i-6) and 21-8c, are set forth in the Appendix hereto (the challenged part of 21-19g being italicized).

JURISDICTION.

Jurisdiction is invoked pursuant to Section 347 of 28 U. S. C. A., and as more particularly set forth in the foregoing petition.

STATEMENT OF THE CASE.

The Summary Statement in the foregoing petition contains all material facts.

The points of law to be considered are therein set forth in the "Reasons Relied On For Allowance of the Writ."

ARGUMENT.

I. That portion of N. J. R. S. 43:21-19g, which taxes contractors on the basis of their subcontractors' employees, violates the "due process" and "equal protection" clauses of the Federal Constitution.

Our submission is that the state court should have held this statutory provision to be unreasonable, discrimina-

tory and invalid under the 14th Amendment to the Federal Constitution for the several reasons hereinafter advanced, viz.:

(a) It Imposed a Fictitious Premise as the Basis for Taxation and Bound the Taxpayer by the Fiction.

In the words of the act, the contractor—"* * * shall be deemed to employ each individual in the employ of each * * * subcontractor." This enforced assumption is wholly opposed to reality. The contractor has no control over the subcontractor, has no relations with the latter's employees and cannot force his subcontractor to open his books to him or to disclose the names, the numbers or the wages of his workmen.

This Court in *Heiner v. Donnan* (1931), 285 U. S. 312, 329, said of a similar statutory enactment:

> "* * * it constitutes an attempt by legislative fiat to enact into existence a fact which here does not and cannot be made in actuality."

To like effect are:

Schlesinger v. Wisconsin (1925), 270 U. S. 230, 240;

In Re Chicago, etc., R. Co. (C. C. A. 7th Cir., 1937), 90 F. 2nd 312, 316;

Commissioner of Internal Revenue v. Shattuck (C. C. A. 7th Cir., 1938), 97 F. 2nd 790, 792.

This assumed premise is not subject to rebuttal by the taxpayer and for this reason violates "due process," as this Court has held in *Hoeper v. Tax Commission*

(1931), 284 U. S. 206, 215; *Manley v. Georgia* (1928), 279 U. S. 1, 6; *Mobile, etc. R. Co. v. Turnipseed* (1910), 219 U. S. 35, 43; *Knowlton v. Moore*, 178 U. S. 41, 77; and *Nichols v. Coolidge*, 274 U. S. 531, 540. Of like effect is the recent state decision of *Kellogg v. Murphy* (Mo., 1942), 164 S. W. (2d) 285, 293-294.

(b) It Introduced a Subclassification that Contravened the Act's Basic Principle of Classification.

The Law, in fixing the minimum of eight employees to establish taxable status for an employer, necessarily creates two classes: one of employers who have seven or less employees and are exempt from the tax, the other of employers who have eight or more employees and are liable to the tax.

This being so, the obvious effect of the statutory provision taxing a contractor who has less than 8 employees, if the number of his subcontractors' employees brings this total to 8 or more, is to take such contractor out of the exempt class in which the general purpose and policy of the statute has placed him and to throw him into the taxable class.

This is subclassification, and subclassification by the New Jersey decisions is discriminatory and unlawful. *Koch v. Essex County Board of Taxation* (S. C. 1921), 97 N. J. L. 61, and *Central Railroad Co. v. State Board of Taxation* (E. & A. 1886), 48 N. J. L. 146. See also Cooley on Taxation, Section 353.

This unique classification of subject contractors measured by the total of their employees and of those of their subcontractors vitiates the central principle of tax liability laid down in the Act. The fixing of a minimum

number of employees as a measure of taxability was derived from the ascertained fact that unemployment occurs to a greater extent in large than in small establishments.

> "* * * the legislative choice finds support in the conclusion reached by students of the problem that unemployment is less likely to occur in businesses having a small number of employees." Per Mr. Justice Stone, in *Carmichael v. Southern Coal Co.* (1936), 301 U. S. 495, 521. See also W. I. King, Employment Hours and Earnings in Prosperity and Depression; Hansen, Bjornaraa, and Sogge, Decline of employment in the 1930-1931 depression in St. Paul, Minneapolis and Duluth, U. of Minn., Employment Stabilization Research Institute, vol. 1, No. 5, pp. 20-25.

A further consideration was the recognition that the extra bookkeeping and administrative work required by small units was not justified.

> "It was deemed necessary to draw the line somewhere in order that the plan be not too cumbersome and unwieldy."
>
> *Gillum v. Johnson* (S. C. Cal. 11-25-36; rehearing denied 12-21-36); 62 P. (2nd) 1037, 1044.

If relatively greater unemployment exists in larger rather than in smaller units, there is certainly no point to combining a number of the smaller employers in order to make a larger and taxable unit. Nothing could be more artificial. The sum of its parts becomes greater than the whole. The result is to provide unemployment compensation for a class of employees (i. e., those less than 8 in number) who, measured by the basic theory of the act, do not need protection. A manufacturer of heating or refrigerating equipment who supplies his product to

the builder of a dwelling house has nothing in common with other subcontractors working on the same house, but his thousands of employees may make them all, as well as their contractor, liable to the tax, where otherwise there would be no liability.

Liability to the tax is thus seen to depend upon purely fortuitous circumstances, which, besides, contravene the central principle of the Act to limit taxation of employers to those having eight or more employees. The subclassification whereby employers with less than eight employees who engage subcontractors, whose employees added to those of the contractor total eight or more, is thus shown to be irrational and unscientific, hence arbitrary and unlawful.

Truax v. Corrigan, 257 U. S. 312, 332;
Southern Rwy. Co. v. Greene, 216 U. S. 400, 417;
Gulf, etc. Ry. Co. v. Ellis, 165 U. S. 155;
Colgate v. Harvey, 296 U. S. 404, 423.

(c) It Required the Petitioner to Pay an Excise Tax on Another Man's Privilege.

The tax levied upon employers is an excise upon the privilege of employing others. *Howes Brothers Co. v. U. C. C.* (S. C. Mass., 1936), 5 N. E. (2d) 720, 730 (cert. den., 57 S. Ct. 434, 81 L. Ed.). Therefore, it is justified only insofar as it is imposed upon the privilege of the contractor to give employment to his workers. To tax petitioner for the privilege of hiring his workmen is one thing; to tax him for the same privilege of employment by his subcontractors is a wholly different thing. The latter is not a tax at all. It is an arbitrary imposition requiring one man to pay for another's privilege. *Montgomery v. Bramford* (S. C. Conn., 1929), 147 Atl. 9.

(d) Its Effect was Necessarily to Discriminate Unfairly Against Petitioner and His Class.

The petitioner was required to pay a tax based on what was done by other men over whom he had no control. Employers other than "contractors" may lawfully limit their employees to seven and thereby escape taxation—this choice is plainly given them by the Act—but our contractor, if he has but one employee, must pay the tax if his subcontractor, whom he does not control, employs as many as seven additional workmen.

Or even if he elects to accept a taxable status based on eight or more employees, he will have to pay an additional tax—in excess of what any other employer under the act must pay—on every employee of a subcontractor who employs less than a total of eight. If he has 20 employees on his own payroll and contracts for the services of 5 subcontractors, each of whom hires 5 workmen, he will pay a greater tax on his subcontractors' employees than he will on his own. No other employer under the act is similarly burdened.

Holding that imposition of a greater tax burden upon one class of taxpayers not scientifically differentiated from another and favored class violates "due process" are the New Jersey decisions of:

Weimer Storage Co. v. Dill (Ch. 1928), 103 N. J. Eq. 307, 143 A. 438;

Trenton Savings Fund v. Richards (S. C. 1889), 52 N. J. L. 156;

Lang v. Berrien (S. C. 1908), 77 N. J. L. 214.

See also:

Independent Gas Co. v. Unemployment Commission (Ga., 1940), 10 S. E. (2d) 58, 60;

Jack Ulmer, Inc. v. Daniel (So. Car., 1940), 7 S. E. (2d) 829, 832.

II. The imposition of penalties for failure to report subcontractors' employees when petitioner had no means of ascertaining these was a taking of his property without due process of law.

Raines was charged in the assessments under review with penalties totaling $154.48 (S. of C., pp. 23 and 26) for failure to report the wages of employees of his subcontractors. As he did not, and could not, know either the number of these employees or their wages (S. of C., p. 29, lines 8-10), it was impossible for him to make the required report. The Commission undertook to penalize him for failing to do the impossible. This, we suggest, is a taking of property without due process of law.

A penalty is an exaction for punitive purposes. It follows an offense of some sort and is intended to discourage repetition of the offense.

> *U. S. v. Buckingham,* 261 Fed. 418, 419;
> *U. S. v. Birmingham Trust, etc. Co.,* 258 Fed. 562;
> *U. S. v. Nash,* 111 Fed. 525;
> *People v. Sloane,* 90 N. Y. S. 762.

But there can be no offense where there is no fault. And the contractor cannot be put in the wrong in failing to report subcontractors' wages while he is deprived of the means of securing this information.

While the right is given the Commission by the act to summon witnesses and to inspect records (R. S. 43:21-11i), no similar right is vested in the contractor-employer. (The contrary suggestion in the opinion below (p. 49) is erroneous.)

CONCLUSION.

The New Jersey Supreme Court announced its decision as to the validity of the questioned statutory provision in terms of conclusion rather than of analysis. A reading of the opinion below by the learned Chief Justice leaves us unenlightened as to the reasons which impelled the court's conclusions. We find only such statements of the obvious as—"All who come within the purview of the classification are included in it" (S. of C., p. 47, line 22). The questions raised by this litigation, it is submitted, deserve a more illuminating response by the court. The issue of validity is a large one measured either by the number of individuals affected or by the total wealth that their taxes bring to the state treasury. The asserted right of a state to command the resources of contractors by counting employees of their subcontractors and indulging the arbitrary presumption that the latter are in fact employed by the contractor invites, we submit, the considered judgment of this Court.

Respectfully submitted,

LOUIS B. LEDUC,
Attorney of Petitioner.

APPENDIX.

Pertinent provisions of New Jersey Unemployment Compensation Law (R. S. 43: sub-title 21).

Section 19(g):

(g) "Employing unit" means any individual or type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has or subsequent to January first, one thousand nine hundred and thirty-six, had in its employ one or more individuals performing services for it within this State. All individuals performing services within this State for any employing unit which maintains two or more separate establishments within this State shall be deemed to be employed by a single employing unit for all the purposes of this chapter. *Whenever any employing unit contracts with or has under it any contractor or subcontractor for any employment which is part of its usual trade, occupation, profession, or business,* unless the employing unit as well as each such contractor or subcontractor is an employer by reason of subsection (c) of section 43:21-8 of this Title or subsection (h) of this section, *the employing unit shall for all the purposes of this chapter be deemed to employ each individual in the employ of each such contractor or subcontractor* for each day during which such individual is engaged in performing such employment; except that each such contractor or subcontractor who is an employer by reason of subsection (c) of section 43:21-8

of this Title or subsection (h) of this section, shall alone be liable for the contributions measured by wages payable to individuals in his employ, and except that any employing unit who shall become liable for and pay contributions with respect to individuals in the employ of any such contractor or subcontractor who is not an employer by reason of subsection (c) of section 43:21-8 of this Title or subsection (h) of this section, may recover the same from such contractor or subcontractor. Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all the purposes of this chapter, whether such individual was hired or paid directly by such employing unit or by such agent or employee; provided, the employing unit had actual or constructive knowledge of the work.

Section 19(h):

(h) "Employer" means:

(1) Any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, within either the current or the preceding calendar year, has or had in employment, eight or more individuals (irrespective of whether the same individuals are or were employed in each such day); • • •

Section 19(i-6):

(i) (6) Services performed by an individual for remuneration shall be deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the commission that

(A) such individual has been and will continue to be free from control or direction over the performance of such service, both under his contract of service and in fact; and

(B) such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(C) such individual is customarily engaged in an independently established trade, occupation, profession or business.

Section 8(c):

(c) (1) An employing unit, not otherwise subject to this chapter which files with the commission its written election to become an employer subject hereto for not less than two calendar years, shall, with the written approval of such election by the commission, become an employer subject hereto to the same extent as all other employers, as of the date stated in such approval; provided, that the commission shall not approve such election by such employing unit to become an employer subject hereto if written objections on the part of a substantial proportion of the individuals in the employ of such employing unit are presented to the commission within ten days following the filing of such election, and shall cease to be subject hereto as of January first of any calendar year subsequent to such two calendar years, only if at least thirty days prior to such first day of January, it has filed with the commission a written notice to that effect.

(2) Any employing unit for which services that do not constitute employment as defined in this chapter are performed, may file with the commission a written election that all such services performed by individuals in its employ in one or more distinct establishments or places of business shall be deemed to constitute employment for all the purposes of this chapter for not less than two calendar years; provided, written objections on the part of a substantial proportion of such individuals affected are not presented to the commission within ten days following the filing of such election. Upon the written approval of such election by the commission, such services shall be deemed to constitute employment subject to this chapter from and after the date stated in such approval. Such services shall cease to be deemed employment subject hereto as of January first of any calendar year subsequent to such two calendar years, only if at least thirty days prior to such first day of January such employing unit has filed with the commission a written notice to that effect.

(24)

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 944

MERLIN F. RAINES,
Petitioner-Plaintiff,

vs.

UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY,
Defendant-Respondent.

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. .....

MERLIN F. RAINES,
Petitioner-Plaintiff,
vs.
UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY,
Defendant-Respondent.

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

Statement of the Case.

The petitioner, Merlin F. Raines, is in the business of a contractor and builder, constructing dwelling houses and other buildings under contracts with landowners in the County of Camden and surrounding counties in New Jersey, and has been so engaged since the year 1938 (R. 1, l. 27; 28, l. 17). During the year of 1940 he had in his direct employ eight and nine individuals for some portion of a day in each of fourteen different weeks, seven individuals in his direct employ for some portion of a day in each of sixteen different weeks, and that during the other weeks of the year he had fewer than seven individuals in his direct employ (R. 37).

The petitioner regularly engaged, during the year 1940, subcontractors who were not "employers" subject to the provisions of the Unemployment Compensation Law of New Jersey. The subcontractors employed one to thirteen individuals for some portion of a day in each of the different weeks of the year 1940 to perform services under the contracts entered into with the petitioner (R. 37).

Under the provisions of Section 19 (g) (N. J. R. S. 43: 21-19 (g)) of the Unemployment Compensation Law of New Jersey, the petitioner became an "employer" subject to the Law on July 14, 1940, as this was the twentieth week in which the petitioner had in "employment" eight or more individuals for some portion of a day in each of twenty different weeks.

The petitioner does not dispute the application of the facts to his situation under the provisions of Section 19 (g) of the Unemployment Compensation Law of New Jersey, but contends that Section 19 (g) of the Law is unconstitutional.

Summary of Argument.

The provision of the Unemployment Compensation Law of New Jersey (N. J. R. S. 43:21-19 (g)) (Appendix) which is challenged by the petitioner does not create an arbitrary and unreasonable classification; the classification applies alike to all persons within its purview and no persons are omitted who have any characteristics of those included. Not only does the classification rest on sound constitutional grounds but avoids evasion of the statute and promotes fair competitive conditions.

The petitioner is not injured by the provision of the statute, above mentioned, and cannot be heard to complain in behalf of others who may be, supposedly, injured.

No substantial question appears to be involved for this Honorable Court's consideration.

ARGUMENT.

POINT I.

The classification prescribed by Section 19 (g) of the Unemployment Compensation Law of New Jersey is not arbitrary and unreasonable.

The classification prescribed by Section 19 (g) of the State Law is consonant with and follows the statute's basic principle of classification. The classification of employers of eight or more individuals, during a prescribed period of time, for the purpose of coverage and taxation under an unemployment compensation law, similar to the one in effect in New Jersey has been constitutionally approved by this Honorable Court in *Carmichael* v. *Southern Coal & Coke Co.* (1936), 301 U. S. 495; and a similar classification in Title IX of the Social Security Act (42 U. S. C. Chap. 7, § 1101) was approved in *Charles C. Steward Machine Co.* v. *Davis* (1936), 301 U. S. 548.

An unemployment compensation law may, consistent with its basic aim and purpose, prescribe a classification which determines the status of an employing unit by including in its employment experience the employment experience of other employing units. Such a provision, which has been judicially approved, is found in subsection 19 (h)

(4) of the New Jersey Law (N. J. R. S. 43:21-19 (h) (4)) (Appendix). This subsection is directly related to subsection 19 (h) (1) which classifies employers of eight or more individuals. That this subsection does not violate the provisions of the Fourteenth Amendment has been declared by this Honorable Court in *Avent* v. *Mississippi Unemployment Compensation Commission, et al.* (1942), 316 U. S. 641.

Similarly, a consideration of separate employing units, owned or controlled by the same interests, for the purpose of establishing a taxable class has been constitutionally sustained in other tax statutes. *United States* v. *Lehigh Valley R. Co.* (1910), 220 U. S. 257; *Chicago, M. & St. P. R. Co.* v. *Minneapolis C. & C. Asso.* (1917), 247 U. S. 490; *United States* v. *Whyel* (1927), 19 F. (2d) 260, affd. (1928, on other grounds) 28 F. (2d) 30, Certiorari denied (1929) 278 U. S. 664; *State Board Etc. of Indiana* v. *Jackson* (1931), 283 U. S. 527; *Fox* v. *Standard Oil Co.* (1934), 294 U. S. 87; *Great Atlantic & Pacific Tea Co.* v. *Grosjean* (1937), 301 U. S. 412; *Natural Gas Pipeline Co.* v. *Slattery* (1937), 302 U. S. 300; *Rochester Telephone Corp.* v. *United States* (1938), 307 U. S. 125; *H. E. Butt Grocery Co.* v. *Sheppard* (1939), 309 U. S. 331.

The provision in issue, herein, refers to an employment relationship more direct than that considered in the aforementioned cases. It provides:

> N. J. R. S. 43:21-19 (g). "* * * Whenever any employing unit contracts with or has under it any contractor or subcontractor for any employment which is part of its usual trade, occupation, profession, or business, unless the employing unit as well as each such contractor or subcontractor is an em-

ployer by reason of subsection (c) of section 43:21-8 of this title or subsection (h) of this section, the employing unit shall for all the purposes of this chapter be deemed to employ each individual in the employ of each such contractor or subcontractor for each day during which such individual is engaged in performing such employment; except that each such contractor or subcontractor who is an employer by reason of subsection (c) of section 43:21-8 of this title or subsection (h) of this section shall alone be liable for the contributions measured by wages payable to individuals in his employ, and except that any employing unit who shall become liable for and pay contributions with respect to individuals in the employ of any such contractor or subcontractor who is not an employer by reason of subsection (c) of section 43:21-8 of this title or subsection (h) of this section, may recover the same from such contractor or subcontractor. * * *". (Printed in full in Appendix.)

We observe that only individuals performing services which are part of the petitioner's usual business are considered; a prescription which is consonant with the statute's basic principle of classification; viz., the requirement of eight or more individuals performing services for the petitioner in the *usual course of his business* as provided for in subsection N. J. R. S. 43:21-19 (h) (1) (Appendix).

The inheritance tax cases cited by the petitioner (Brief 8-9) do not involve a classification similar to that in the instant case. In the inheritance tax cases the irrebuttable presumption was tantamount to a rule of substantive law and when construed as such, created a result or classification that was arbitrary and unreasonable and which had no rational relation to the objects of the legislation; a legisla-

tive attempt to prevent evasion will not of itself render valid an otherwise arbitrary classification. Similarly, statutes that create an unreasonable presumption of guilt of a criminal offense are not analogous to the provision of the statute involved herein.

POINT II.

Section 19 (g) promotes fair competitive conditions and prevents evasion of the statute.

This Honorable Court in the case of *Great Atlantic & Pacific Tea Co.* v. *Grosjean* (1936), 301 U. S. 412, upheld the constitutionality of a state statute which imposed an "occupation tax" upon chain stores; in holding that the prescribed classification was not arbitrary and unreasonable as it prevented unfair competitive conditions, this Court at page 426, says:

> "Taxation may be made the implement of the exercise of the State's police power; and proper and reasonable discrimination between classes to promote fair competitive conditions and to equalize economic advantages is therefore lawful."

See also:

Carmichael v. *Southern Coal & Coke Co., supra.*

That the petitioner is an innocent party not intending to evade the law is not material, as the classification is otherwise reasonable. The statutory provision does not differentiate between situations involving actual fraud and those involving good faith. The innocent cannot complain, as the classification applies alike to all persons within its

purview, and reasonable ground exists for making a distinction between those who fall within the class and those who do not. *Cf. Purity Extract & Tonic Co.* v. *Lynch* (1912), 226 U. S. 192; *Euclid* v. *Ambler Realty Co.*, (1926), 272 U. S. 365.

POINT III.

The petitioner cannot challenge Section 19 (g) of the statute in behalf of his contractors or subcontractors.

We respectfully submit that the hereinbefore quoted provision of the statute which permits the petitioner to reimburse himself for all contributions paid with respect to the employees of his contractors or subcontractors from all moneys due to said contractors or subcontractors or, in any event, to recover the same from said contractors or subcontractors in an action at law, does not harm the petitioner. This is a right and privilege conferred upon the petitioner which does not injure him but, in fact, helps him. The petitioner contends that the provision injures his contractors or subcontractors; however, we respectfully submit, the petitioner must show that his constitutional rights are impaired and cannot rely upon supposititious situations or fanciful illustrations to show that as against him a statute is unconstitutional.

The validity of an act of the legislature cannot be challenged by a person who is not directly injured by the particular feature of the legislative act complained of. As stated by the Court in the case of *Massachusetts* v. *Mellon* (1922), 262 U. S. 474, 488:

> "We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which would otherwise stand in the way of the enforcement of a legal right. The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement; and not merely that he suffers in some indefinite way in common with people generally. * * *"

Similarly:

> *Sexton* v. *Newark District Tel. Co.* (Court of Errors and Appeals, 1913), 84 N. J. L. 85, aff'd 86 N. J. L. 701;
> *Bourjois* v. *Chapman* (1937), 301 U. S. 183.

See also:

> *Alabama Power Co.* v. *Ickes* (1937), 302 U. S. 464.

POINT IV.

Penalties were properly assessed against petitioner.

Penalties under the statute are assessed for the failure to file the required tax returns (N. J. R. S. 43:21-14(a)). The petitioner knew of the statute and its application to his situation; in fact, he had originally deducted "workers'

contributions'' which were never remitted to the respondent (R. 33, l. 23). The petitioner could have filed his tax returns ''under protest'' and avoided the assessment of penalties; this he chose not to do.

The difficulty of securing information to file proper reports, as complained of by the petitioner, does not appear from the record (R. 33, 37-38). We further direct attention to the fact that out of 30,548 active and inactive employers who reported to the respondent prior to January 1, 1942, more than 1,000 have reported wages paid to employees of contractors and sub-contractors under the provisions of section 19(g). At the present moment, approximately 400 employers are reporting the wages paid to employees of their contractors and sub-contractors. The practical difficulty of making such reports and paying the taxes does not appear to be insuperable.

Conclusion.

The provision of the Unemployment Compensation Law of New Jersey which is constitutionally challenged by the petitioner is indispensable to the equitable and effective administration of the Law. Without it, thousands of workers in the State of New Jersey would have been and will be denied the benefits of the Law.

We respectfully submit that the provision not only avoids evasion of the Law and prevents unfair competitive conditions, but avoids an unreasonable discrimination which would otherwise obtain. It avoids the undesirable and unfair situation where an employing unit may avoid the attachment of subject status under the Law and the

coverage of workers by carrying on his usual business through contractors and subcontractors. It creates a just and reasonable classification which applies to all within its purview and which has a direct and reasonable relation to the objects and purpose of the legislation.

We respectfully submit that the application for a writ of certiorari should be denied.

Respectfully submitted,

HERMAN D. RINGLE,
Counsel for Respondent.

CHARLES A. MALLOY,
Chief Counsel.

APPENDIX.

(g) "Employing unit" means any individual or type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has or subsequent to January first, one thousand nine hundred and thirty-six, had in its employ one or more individuals performing services for it within this State. All individuals performing services within this State for any employing unit which maintains two or more separate establishments within this State shall be deemed to be employed by a single employing unit for all the purposes of this chapter. *Whenever any employing unit contracts with or has under it any contractor or subcontractor for any employment which is part of its usual trade, occupation, profession, or business, unless the employing unit as well as each such contractor or subcontractor is an employer by reason of subsection (c) of section 43:21-8 of this title or subsection (h) of this section, the employing unit shall for all the purposes of this chapter be deemed to employ each individual in the employ of each such contractor or subcontractor for each day during which such individual is engaged in performing such employment; except that each such contractor or subcontractor who is an employer by reason of subsection (c) of section 43:21-8 of this title or subsection (h) of this section, shall alone be liable for the contributions measured by wages payable to individuals in his employ, and except that any employing unit who shall become liable for and pay contributions with respect to individuals in the employ of any such contractor or subcontractor who is not an employer by reason of subsection (c) of section 43:21-8 of this title or subsection (h) of this section, may recover the same from such contractor or subcontractor.* Each individual em-

ployed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all the purposes of this chapter, whether such individual was hired or paid directly by such employing unit or by such agent or employee; *provided,* the employing unit had actual or constructive knowledge of the work. (Italics ours.)

(h) "Employer" means:

(1) Any employing unit which for some portion of a day, but not necessarily simultaneously in each of twenty different weeks, whether or not such weeks are or were consecutive, within either the current or the preceding calendar year, has or had in employment, eight or more individuals (irrespective of whether the same individuals are or were employed in each such day);

(2) * * *

(3) * * *

(4) Any employing unit which together with one or more other employing units, is owned or controlled (by legally enforcible means or otherwise), directly or indirectly by the same interests, or which owns or controls one or more other employing units (by legally enforcible means or otherwise), and which, if treated as a single unit with such other employing units or interests, would be an employer under paragraph (1) of this subsection;